QUESTIONS PRESENTED

Respondents Paul L. Spink, et al., restate the Questions Presented in the Petitioners' brief as follows:

1. Whether the Ninth Circuit correctly held that a pension plan sponsor can be liable for breach of fiduciary duty under Section 406 the Employee Retirement Income Security Act of 1974 ("ERISA"), when it amends the terms of its pension plan, as Lockheed did here.

2. Whether the Ninth Circuit correctly applied the legal standard this Court enunciated in Landgraf v. USI Film Prods., 114 S.Ct. 1483 (1994) in holding that the Omnibus Budget Reconciliation Act of 1986 ("OBRA 1986"), which amended ERISA and the Age Discrimination in Employment Act ("ADEA") to eradicate age discrimination, requires Lockheed to calculate pension benefits for older workers by including all years of service regardless of age, including those years when an employee was excluded from plan participation because of age.

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STATEMENT OF THE CASE

On February 5, 1992, Respondent Paul L. Spink ("Spink") commenced this putative class action against Lockheed Corporation, certain of its corporate officers, and the members of the Retirement Plan Committee for the Lockheed Retirement Plan for Certain Salaried Employees ("Plan"),[1] asserting claims under ERISA and the ADEA. At the core of his complaint are Spink's contentions that Petitioners violated his rights and those of other plan participants by using plan assets held in trust to purchase broad waivers of liability against Lockheed, a party in interest, and by calculating pension benefits for certain older workers in a way which improperly reduced the rate of benefit accrual because of age. (JA 1, 4-29).[2]

The first issue arose when Lockheed -- a named fiduciary acting within its fiduciary duties under the Plan -- amended the Plan in 1990 to include unlawful provisions which caused the Plan to pay out assets held in trust as early retirement benefits in exchange for broad waivers of all employment-related claims against Lockheed, and then Lockheed and the Committee -- whose members are also named fiduciaries acting pursuant to their fiduciary responsibilities under the Plan -- administered the Plan according to these illegal terms, directly using plan assets for the benefit of Lockheed. (JA 7-11, 20-23, 45-47). Spink alleged in his complaint that this conduct violated ERISA's fiduciary duties set forth in § 404 and resulted in a prohibited transaction in violation of § 406(a)(1)(D). 29 U.S.C. §§ 1104,

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1/ To avoid confusion, Spink will refer to Lockheed Corporation as "Lockheed," the members of Retirement Plan Committee as "the Committee" and to all petitioners jointly as "Petitioners."

2/ Throughout this brief, the following abbreviations are used: "JA" is the Joint Appendix submitted by the parties; "Pet. Brief" refers to the Brief of Petitioners filed with this Court on or about February 29, 1996; "ER" refers to the Excerpts of Record filed with the Ninth Circuit in connection with the appeal; and "CR" followed by a number refers to the Clerk's Record, with reference to the docket number of the document identified. The trial court's docket sheet may be found at pages 58-59 of the Excerpts of Record.

1106(a)(1)(D). (JA 21-24). In response to Petitioners' motion to dismiss under Rule 12(b)(6), Spink argued that the challenged conduct also ran afoul of ERISA's "anti-inurement" clause in § 403. 29 U.S.C. § 1103(c)(1).

The second challenge stemmed from Petitioners' practice of excluding years of service worked before December 25, 1988 from benefit accrual calculations because of the employee's age at the time of hire. When Spink retired in 1990, the Plan employed a benefit calculation formula which used an employee's years of Credited Service as a key factor in calculating an employee's pension benefits at retirement. Credited Service included virtually all years of an employee's tenure with Lockheed. The only actual years of service excluded were those worked in plan years before 1988 by any employee who was hired during that period at a time when he or she was age 60 or older. (JA 42-44; CR 7 at 39-40, 54). Because the Plan's benefit accrual formula excluded these years of service based on age, Spink alleged that it violated proscriptions under ERISA and the ADEA against maintaining a defined benefit pension plan which "requires or permits . . . the reduction of the rate of an employee's benefit accrual, because of age." ADEA § 4, 29 U.S.C. § 623(j)(1)(A); ERISA § 204, 29 U.S.C. § 1054(a)(1) and (b)(1)(H)(i). (JA 14-20).

Both practices challenged in this action have had a deleterious impact on Spink and those like him since the time of their retirement. Although eligible to elect the early retirement option, Spink did not do so because he did not want to waive his right to challenge the Plan's discriminatory benefit formula. After more than 11 years of continuous service with Lockheed, therefore, Spink retired on June 30, 1990 with a pension benefit of less than $100 per month because Petitioners only credited him with the last 18 months of his employment and because he could not obtain enhanced early retirement benefits without waiving his right to bring his ADEA and ERISA claims. (JA 16-17, 79).

Petitioners sought dismissal of Spink's complaint through a motion under Rule 12(b)(6) asserting failure to state a claim for relief. The district court granted the motion, entering judgment against Spink on July 31, 1992.

On appeal, the Ninth Circuit reversed in an opinion filed July 18, 1995. In overturning the district court's

dismissal of Spink's claims against Lockheed and 12 individual defendants, the Ninth Circuit held that Lockheed's act of amending the plan document together with its implementation by Lockheed and the individual defendants violated § 406(a)(1)(D) of ERISA, by requiring the plan to engage in multiple transactions using plan assets held in trust for the benefit of a party in interest.[3]

Following the analytical model enunciated by this Court in Landgraf v. USI Film Prods., __ U.S. __, 114 S.Ct. 1483 (1994), the Ninth Circuit held that the language and structure of OBRA, as demonstrated by the legislative history illuminating the text, manifested "Congress' intention that pre-enactment service years be included in calculating benefit accrual for older employees," like Spink. (JA 86). The Court never went past the first step of the Landgraf model because it found that "Congress ha[d] expressly prescribed the statute's proper reach." Id., at 1505. Nonetheless, in obiter dictum, the Court tried to resolve the parties' debate about whether Spink's interpretation of OBRA operated retroactively, opining that it did. (JA 82 n.1). Finally, while both parties urged the court to consider their view of regulatory pronouncements of the Internal Revenue Service (IRS), the Ninth Circuit "decline[d] to apply either of these interpretations" because the IRS never adopted final regulations based on its proposed interpretations. (Id. 86-87 n.3).

Lockheed filed a petition for certiorari seeking review of two questions: first, whether the Ninth Circuit erred in holding that a plan sponsor can be liable under § 406 when it amends the terms of its pension plan;[4] and second, whether

3/ Although the Ninth Circuit focussed attention on Lockheed's argument that it could not be held liable by virtue of its act of amending alone, there is no question that the Ninth Circuit held that the amendment and its implementation violated § 406, because it reversed the dismissal of this claim as to all defendants. This ruling necessarily reaches the implementation issue since Spink has never alleged that the Committee members were involved in amending the Plan. Further, in reaching its conclusion, the Ninth Circuit discusses in detail the nature of the benefit Lockheed obtained when it was implemented. (JA 79, 87-91).

4/ Petitioners now concede that implementing a plan amendment which violates ERISA can be a fiduciary breach and that amending a plan to require such a violation might be subject to fiduciary analysis. In footnote

the Ninth Circuit was correct in construing OBRA 1986's benefit accrual provisions to bar Lockheed from calculating pension benefits for older workers by excluding certain years of service because of their age when hired.

SUMMARY OF ARGUMENT

As to the nucleus of claims asserted to challenge Lockheed's waiver for benefits exchange, the only issue raised in the Petition for Certiorari was whether a pension plan sponsor can be liable for breach of fiduciary duty under ERISA § 406 for amending the terms of its pension plan in the way Lockheed did here. All other issues discussed by Lockheed and its amici should be disregarded under Rule 14.1(a).

Lockheed's amendment mandating a participant's waiver of virtually all claims against the employer as a condition of receiving early retirement benefits paid out of plan assets held in trust violates § 406(a)(1)(D) of ERISA, which provides that a fiduciary may not "cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect . . . transfer to, or use by or for the benefit of, a party in interest of any assets of the plan." The waivers which Lockheed purchased with plan assets provided the company with a direct, non-incidental benefit, unlike the benefits which naturally flow from the administration of a retirement plan. Further, there is nothing either in the language, structure or purpose of ERISA or in the common law of trusts which supports Lockheed's argument that an amendment which disposes of plan assets within the meaning of § 406 is a "settlor" function

11, Petitioners state, contrary to the position taken in their petition, that the act of amending would be a fiduciary act if the "Plan amendment purported to direct the fiduciaries to engage in conduct that violated some other provision of ERISA," including the fiduciary statutes, provided that "the fiduciaries followed the [new] terms of the plan." (Compare Pet. Brief 19 n. 11 with Pet. 7). Petitioners also assert in the same footnote that, since no provision of ERISA prohibits the payment of pension benefits to eligible participants, this case involves no such issue. As Spink discusses in Section II-A, however, the amendment here directs a prohibited transaction. Thus, this case involves exactly the type of amendment which Lockheed has apparently conceded is subject to fiduciary analysis.

falling outside the definition of a fiduciary under § 3(21)(A) of ERISA. This is particularly true here where Lockheed acted as a named fiduciary exercising its fiduciary duties under the Plan.

On the second question presented, the language, structure, purpose and legislative history of the benefit accrual provisions of OBRA all point to the conclusion that it is a violation of federal prohibitions against reducing an employee's "rate of benefit accrual" because of age under ERISA and the ADEA for a plan to use a benefit formula which excludes any years of service because of age -- even those years when an older worker was lawfully excluded from participation prior to OBRA 1986. Nothing in OBRA 1986 permits or requires the exception Petitioners would carve out for participants in Spink's shoes. Moreover, such an interpretation conflicts with the remedial goals of OBRA and the statutes it amends.

Even if Congress had not made its intent so clear, since the application urged by Spink is not retroactive, Lockheed may not invoke the presumption against retroactivity. Instead any statutory ambiguity must be resolved in favor of broad coverage and protection against discrimination. What is more, any presumption of retroactivity is rebutted by Congress' clear intent.

ARGUMENT

I. THIS COURT SHOULD LIMIT ITS REVIEW TO THE QUESTION SET FORTH IN LOCKHEED'S PETITION.

The Question Presented in the Petition for Certiorari is a narrow one which encompasses only part of the Ninth Circuit's holding: whether a pension plan sponsor can be liable for breach of fiduciary duty under ERISA § 406 for amending the terms of its pension plan in the way Lockheed did here. But it differs in important respects from the issue asserted at the outset of Petitioners' Brief.

Petitioners unfairly attempt to expand the original Question Presented beyond the amendment issue to sweep in Spink's distinct claims against Lockheed and the individual

petitioners, not for any role they had in amending the Plan, but for their implementation of the Plan amendment. While these implementation claims may be "complementary to" or "related to" the amendment issue raised in the Petition, they are not "fairly included therein" within the meaning of this Court's Rule 14.1(a), and thus may not be presented for consideration by this Court.[5] Yee v. City of Escondido, Cal., 112 S.Ct. 1522 (1992); Caspari v. Bohlen, 114 S.Ct. 948, 952 (1994).

In addition, despite the fact that the Ninth Circuit explicitly chose not to address Spink's "anti-inurement" argument, his fiduciary claims under ERISA § 404, or his equitable estoppel argument[6] (JA 78, 88 n. 5); Petitioners improperly ask this Court to remand the case "with instructions to affirm in all respects the decision of the district court," thus implicitly raising issues which are clearly not before this Court. (Pet. Brief 48). Finally, one amicus would have this Court decide another issue not before it, i.e., whether a party in interest, as opposed to a fiduciary, may be held liable for engaging in a prohibited transaction. None of these are "fairly included" in Petitioners' initial Question Presented.

Had these issues been raised in the Petition, Spink could have successfully opposed granting review on a number of grounds not addressed in his opposition. Because these issues are distinct from the amendment question actually raised in the Petition, this Court should decide only the question on which it granted review.

5/ Implementation of the amendment was never mentioned in the Petition for Certiorari.

6/ To recruit Spink from his job at Hughes Helicopters in 1979, at the time he was hired, Lockheed told him that he would be covered by its retirement plan and for the next 4 years he received written year-end statements which showed him accruing years of Credited Service. (JA 78).

II. LOCKHEED ENGAGED IN A PROHIBITED TRANSACTION IN AMENDING ITS PLAN TO DIRECT PLAN FIDUCIARIES TO USE PLAN ASSETS BY AND FOR ITS BENEFIT.

While Lockheed and its amici raise a dizzying array of justifications for Lockheed's purchase of waivers with Plan assets, the question before this Court ultimately turns on relatively simple principles about what employers and fiduciaries can and cannot do with assets they hold in trust, the issue which most concerned legislators in passing ERISA. As this Court has noted, "[T]he crucible of congressional concern was the misuse and mismanagement of plan assets by plan administrators." Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 141 n. 8, 105 S.Ct. 3085, 3090 n. 8 (1985) (emphasis added).

ERISA explicitly prohibits the type of transaction which took place here and it does so without regard to any false distinction between whether this transaction was initiated at the discretion of the Plan Committee or other Plan fiduciaries or occurred merely as the result of these fiduciaries "implementing" a plan amendment adopted by Lockheed as a named fiduciary. In fact, ERISA is much more concerned with the "end" of protecting retirement plan monies held in trust from any possible use by or for a plan sponsor or employer than it is with the "means" by which such a prohibited transaction takes place.

Thus, ERISA focuses on defining "prohibited transactions" by reference, not to the method by which such transactions are initiated, but rather by listing types of transactions which are prohibited. Commissioner v. Keystone Consolidated Indus., Inc., 508 U.S. 152, 113 S. Ct. 2006, 2112 (1993) ("Congress' goal was to bar categorically a transaction that was likely to injure the pension plan.")[7] Section 406 enumerates these prohibited transactions, including various transactions between a plan and a "party in

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7/ The guiding principle of ERISA is set forth throughout the statute. ERISA § 403(c)(1), 29 U.S.C. § 1103(c)(1); ERISA § 2, 29 U.S.C. § 1001(b); ERISA § 404(a)(1)(i), 29 U.S.C. § 1104(a)(1)(i).

interest."[8] ERISA § 406(a)(1)(A)-(E), 29 U.S.C. § 1106(a)(1)(A)-(E). Cf. ERISA § 406(b), 29 U.S.C. § 1106(b) (breach where fiduciary deals with plan assets "in his own interest" or on behalf of party with interests adverse to the plan or its participants).

In order to safeguard retirement benefits, Congress went beyond common law trust theory by statutorily defining persons or entities deemed as a matter of law to exercise too much potential influence over Plan trustees.[9] Referring to such entities as "parties in interest," ERISA absolutely prohibits transactions in which a fiduciary "cause[s] the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect . . . (D) transfer to, or use by or for the benefit of, a party in interest of any assets of the plan. . . ." Section 406(a)(1)(D) (emphasis added).

Engaging in any such transaction constitutes a per se violation of ERISA, without respect to why or how the plan came to be doing business with the "party in interest."[10] M & R Investment Co., Inc. v. Fitzsimmons, 685 F.2d 283, 287 (9th Cir. 1982).[11] ERISA holds fiduciaries responsible for ensuring such transactions do not take place, instructing them that ERISA's prohibitions trump any contrary instructions in Plan documents. ERISA § 404(a)(1)(D) & 405, 29 U.S.C. § 1104(a)(1)(D) & 1105; Cf. Curtiss-Wright Corp. v. Schoonejongen, __ U.S. __, 115 S. Ct. 1223, 1230 (1995) (plan administrator's duty may include responsibility to sort out "bona fide amendments" from amendments which are not).

Recognizing the all-encompassing scope of § 406 and the need to permit certain transactions which would actually benefit plan participants, Congress established statutory and administrative exemptions to the prohibited transaction rules. Certain recurrent transactions necessary to running most retirement plans were exempted under § 408(b), including, for example, contracting with a party in interest to render accounting services for the plan which is exempted under § 408(b)(2).[12] In addition, ERISA § 408(a) provides that a plan or a party in interest may request a review of any proposed transaction by the Department of Labor and allows the Secretary of Labor to issue exemptions for entire classes of recurring transactions.[13]

Despite the fact that the challenged amendment clearly provided for a quid pro quo in which assets held in trust were exchanged for waivers of corporate liability, Lockheed and its amici attack the Ninth Circuit's holding that this arrangement constitutes a prohibited transaction.[14]

8/ All parties concede Lockheed is a "party in interest."

9/ While traditional trust theory generally requires trustees to avoid transactions in which their judgment might be unduly influenced by their relationship to third parties, "Congress was apprehensive that exceptions to the common law rules against self-dealing were unduly eroding the underlying principle and included Section 406 as a barrier to such erosion." Lowen v. Tower Asset Management, Inc., 829 F.2d 1209, 1215 (2d Cir. 1987) (citing S.Rep. No. 127, 93d Cong., 2d Sess., reprinted in 1974 U.S. Code Cong. & Admin. News 4838, 4865).

10/ Congress made such transactions per se violations of ERISA to safeguard the financial integrity of plans and to ensure that adequate resources would be available to pay promised benefits. Commissioner v. Keystone Consolidated Industries, Inc., 508 U.S. 152. The courts and case books are filled with cases in which retirees lost benefits for which they worked a lifetime, either through dissipation of plan assets, failures to meet Congressional funding minimums, changes in the value of assets held in trust, or because there is nothing magic in the minimum funding levels set by Congress. It is because the economic future is uncertain and the assets employers hold in trust are the only real world guarantee that promised benefits will ever be paid, that ERISA is so concerned with how fiduciaries deal with trust assets. Massachusetts Mut. Life Ins. Co. V. Russell, 473 U.S. at 141 n. 8.

11/ See also Lowen v. Tower Asset Management, Inc., 829 F.2d at 1213; Donovan v. Cunningham, 716 F.2d 1455, 1464-1465 (5th Cir. 1983); Cutaiar v. Marshall, 590 F.2d 523, 528 (3d Cir. 1979).

12/ ERISA is concerned with all expenditures of plan assets right down to the costs of administering the plan. ERISA § 404(a)(1)(A)(ii).

13/ Petitioners have never sought such an exemption.

14/ Indeed, the U.S. Chamber of Commerce goes so far as to argue that paying benefits to participants violates ERISA § 406(a)(1)(D), which can only be accomplished via the statutory exception created by § 408(b)(9). (Ch. Brf. 6-7). This misreads the statute by confusing payments to an "employee," who is also a party in interest, with payments to a retired

They argue either that the transaction produced no real benefit to Lockheed or that the type of benefit it produced is indistinguishable from other, non-prohibited benefits. They also contend that, even if there were a prohibited benefit, Lockheed cannot be held liable under § 406 because amending a plan can never be a fiduciary act.[15]

A. Lockheed's Amendment Caused The Plan To Use Plan Assets For the "Benefit" of A Party in Interest.

While employers are under no obligation to offer retirement plans at all, Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 11 (1987), once assets have been placed in trust for a company's employees, employers lose any claim on them. ERISA § 403(c)(1). As the structure and provisions of ERISA and relevant case law make clear, employers may only benefit from such assets to the extent that such "benefits" flow as natural and unavoidable consequences of offering retirement plans to their employees, i.e., whatever consequences flow, without more, from: (a) offering retirement benefits to employees or prospective employees; (b) retirement of employees, or (c) payment of benefits. In § 404 cases, such benefits have been termed "incidental" not because they are small or insignificant but because they are natural incidents of the administration of pension plans.[16]

"participant," who is not. (U.S. Brief 15, n.10).

15/ Lockheed also argues the amendment cannot be a prohibited transaction as the amendment itself is not a "transaction" (Pet. Brief 22-23), but § 406 does not require that the offending fiduciary be present in the transaction, merely that the fiduciary "cause the plan to engage in a [prohibited] transaction." ERISA § 406(a)(1)(D). The amendment clearly "caused" a transaction between the Plan and its participants, allowing Lockheed to "indirectly" use plan assets to obtain waivers.

16/ Donovan v. Bierwirth, 680 F.2d 263, 271 (2d Cir. 1982) (In case coining phrase "incidental benefit," Judge Friendly noted that although corporate officers who are also plan trustees do not violate their fiduciary duties in taking what they consider to be best action, after "careful and impartial investigation", simply because that action "incidentally benefits" the corporation or themselves, their decisions must be made with "eye

Lockheed and its amici argue that the challenged waiver is indistinguishable from benefits which plan sponsors routinely receive in return for paying retirement benefits, such as: (1) attracting or retaining employees (2) deferring employee compensation; (3) settling collective bargaining disputes or avoiding strikes; (4) providing increased compensation without impacting corporate cash flow or in lieu of wage increases; (5) increasing turnover; or (6) reducing the likelihood of lawsuits by former employees who receive early retirement benefits rather than simply being laid off. (E.g., Pet. Brf. 26-28; Chamber Brf. 9-11; ERIC Brf. 25-27). Yet all of these benefits flow directly from the act of having a pension plan and paying benefits, quite different from Lockheed's use of plan assets pursuant to the amendment to barter with retiring employees for various chose in action.

In responding to Lockheed's argument that the waivers provided it with no benefit at all (JA 90-91), the Ninth Circuit found the waivers actually provided Lockheed a "significant benefit." Lockheed argues this analysis undermines the "bright line" test Congress intended for prohibited transactions under § 406. (Pet. Brf. 23-24; Chamber Brf. 16-22). Apparently hoping to eviscerate the statute entirely, Lockheed offers no real way to distinguish those benefits which give rise to a § 406 violation from those a company may enjoy without running afoul of ERISA. Rather they argue that plan sponsors should be free to reap any benefits they desire, so long as transactions begin with plan amendments and involve paying benefits to plan participants at some point in the transaction.[17] This "bright

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single to the interests" of plan participants and beneficiaries, which creates duty to avoid placing themselves in a position where acts as corporate officers "would prevent functioning with complete loyalty to participants.")

17/ Given this analysis, it is difficult to understand why amicus ERISA Industry Committee (ERIC) stops short of advocating open raiding of surplus assets in the hypothetical set forth in footnote 25 at page 26 of its brief. Nothing in Lockheed's or ERIC's analysis would stop a company from adopting an amendment to provide retirees with an extra $2,000 per month in benefits, conditioned on an "eligibility requirement" that these

line" rule is so expansive that it would obliterate § 406 protections entirely.

That Lockheed violated ERISA in using plan assets to buy waivers of corporate liability is supported by the case law. A review of cases holding that employers received only "incidental benefits" as a result of using plan assets to induce or discourage retirement leads inevitably to the conclusion that benefits which arise directly out of the process of maintaining and administering a pension plan, including paying benefits, will be determined to be "incidental" while benefits arising from other sources will be deemed "non-incidental" or "direct" benefits.[18] Applying these standards, it is easy to see that an employee's release of all claims she may have against Lockheed -- including toxic tort claims, sexual harassment complaints, discrimination charges, and other potential disputes -- does not flow naturally from plan administration but instead is a separate and distinct benefit to Lockheed which liquidates the employee's potential damages, as well as Lockheed's possible defense costs. Such an exchange directly benefitted Lockheed as prohibited by § 406.

Although Lockheed claims the kinds of benefits it purchased with Plan assets were expressly authorized by Congress in the Older Workers' Benefit Protection Act ("OWBPA"), Pub. L. No. 101-433, 104 Stat 978 (1990), this is simply not true. Far from endorsing or even addressing the use of plan assets to obtain waivers, OWBPA was designed to prevent employers from taking advantage of older workers through the improper use of waivers, not to sanction

retirees execute an assignment of $1,500 per month back to the company.

18/ Compare Fletcher v. Kroger Co., 942 F.2d 1137, 1140 (7th Cir. 1991) (increased efficiency of operation is incidental benefit); Trenton v. Scott Paper Co., 832 F.2d 806 (3d Cir. 1987) (same); Bass v. Retirement Plan of Conoco, Inc., 676 F.Supp 735, 744-745 (W.D. La. 1988) (workforce reduction is incidental benefit), with Leigh v. Engle, 727 F.2d 113 (7th Cir. 1984) (finding direct benefit in ERISA violation where plan assets invested in corporations which were takeover targets in order to increase price of stock which defendants owned).

employers' use of pension assets held in trust to buy off unrelated litigation liabilities.[19] (See AARP Brf. Section I).

Nor does the case law shore up Lockheed's defense of its waiver. None of its "waiver" cases involve a claim that the employer, trustees or any other fiduciary violated Section 406(a)(1)(D), or deal with the exchange of pension trust assets for waivers. Instead they concern employees who signed releases in exchange for severance pay or unfunded welfare benefits. Thus, they provide no guidance regarding the resolution of the key issue before this Court.[20]

As a matter of policy, Lockheed and its amici project that the Ninth Circuit's ruling will have a cataclysmic impact on labor relations, the discretion of employers to make business decisions, and the smooth administration of pension plans throughout the nation. These projections are either exaggerated or inapposite.

Petitioners argue that the Ninth Circuit's decision "declares illegal a longstanding and widespread practice." (Pet. 25). In light of the Ninth Circuit's statement that "Lockheed is free to disregard employees' interest in amending the Plan," it cannot be said that the decision below places any limitation on an employer's ability to amend their plan as part of the settlement of a collective bargaining dispute, to avoid a strike, or in the other contexts raised by

19/ Nor do the Treasury regulations on covenants not to compete provide any support for Petitioners' position. (U.S. Brief 22, n. 15).

20/ See, e.g., Harlan v. Sohio Petroleum Co., 677 F.Supp. 1021, 1026 (N.D.Cal. 1988) (court noting that "[t]his is not a situation where the plan had already been in effect, and the defendant [employer] sought to condition the benefits on a later required release," in holding § 404 does not apply to the "creation" of a new welfare benefit plan which required releases as a condition of participation); Astor v. International Business Machines Corp., 7 F.3d 533, 534-6 (6th Cir. 1993) (plaintiffs never challenged newly-funded early retirement program's waiver requirement, instead claiming fraudulent inducement); Smart v. Gillette Co. Long-Term Disability Plan, 70 F.3d 173 (1st Cir. 1995) (plaintiff signed release in return for receiving severance pay from defendant company and participating in various unfunded ERISA welfare plans); Cirillo v. Arco Chemical Co., 862 F.2d 448 (3rd Cir. 1988) (not brought under ERISA; sole issue was whether employee executed a "knowing and voluntary" waiver of ADEA rights).

Petitioners. (JA 89). Instead it simply affirms established Supreme Court law that the terms of any such amendment cannot violate substantive provisions of ERISA. United Mine Workers of America Health and Retirement Funds v. Robinson, 455 U.S. 562, 102 S.Ct. 1226 (1982).

Nor is there anything in the Ninth Circuit's decision which would outlaw any form of early retirement program except those which require employees to relinquish all rights they may have to sue their employer in order to obtain benefits which are paid out of pension funds held in trust. It does not bar employers from providing enhanced benefits out of plan assets without requiring a waiver of all claims. Nor does it prevent an employer from financing such a program with its own assets.

Because of its narrow holding, the Ninth Circuit's decision will have very little effect on early retirement incentive programs as they are used by the vast majority of businesses in the United States. While it seems that such programs are used by some companies and that a small proportion of them request waivers in exchange for the early retirement benefits, it is clear that few employers have followed Lockheed's lead by dipping into plan assets held in trust -- as opposed to their own corporate funds -- to buy waivers of employment-related claims in connection with the payment of such benefits.[21]

21/ For example, while it found that 80% of the Fortune 100 companies offered some sort of early retirement program at least one year during the period from 1979 through 1988, the U.S. Government Accounting Office (GAO) determined that only 28% of the employers with such programs required participants to sign waivers **of any sort** in order to receive benefits. See General Accounting Office Use of Waivers by Large Companies Offering Exit Incentives to Employees, GAO/HRD 89-87 at 4-5 (1989). More significantly, only about 5% of the 198,281 employees who elected to leave under early retirement programs during the relevant ten years had to sign waivers in order to receive enhanced benefits under an existing pension plan, as opposed to a newly created severance package program, and there is no indication in the report as to whether these enhanced benefits were paid out of pension assets held in trust or by a new contribution by the sponsoring employer. Id., at 7. Even assuming, arguendo, that all these benefits were paid out of assets held in trust and all of the waivers were as all-inclusive as those used by Petitioners here, according to the authorities cited in the Petition, the practice at issue here affected less than 10,000 employees out of a workforce of approximately

Even if this were not true, the law should not countenance a corporate strategy which uses plan assets held in trust as if they belonged in the coffers of the plan sponsor, merely because the strategy is accomplished by formal amendment of the plan document or by calling the transfer of assets a payment of benefits. Such a ruling would eviscerate the force of Section 406 and effectively gut the prohibitions against improper use of trust funds which constitute the foundation not only of ERISA but of long-recognized common law trust principles.

B. Lockheed Acted As a Fiduciary in Amending the Plan to Dispose of Plan Assets.

Lockheed contends it cannot be held liable as a fiduciary who "cause[d] the plan to engage in" a prohibited transaction under § 406(a)(1)(D), arguing that it did not "act in a fiduciary capacity . . . because amending the Plan to create a new retirement benefit is a settlor function, which was undertaken by Lockheed in its corporate capacity." (Pet. Brief 12). While this Court recently observed that plan sponsors are generally free under ERISA to adopt, modify, or terminate *welfare* plans, Curtiss-Wright Corp. v. Schoonejongen, 115 S.Ct. at 1228, it has never addressed the issue raised by Lockheed here: whether the plan sponsor and named fiduciary acts as a fiduciary under ERISA when it amends a defined benefits *pension* plan so as to direct a disposition of plan assets held in trust which constitutes a prohibited transaction under § 406.[22]

8.3 million over a ten-year period. Id., at 4.

22/ The distinction between modifying a welfare plan and amending a pension plan is a significant one in the context of an alleged § 406 violation. Unlike with pension plans, ERISA does not impose any minimum participation, vesting or funding requirements on welfare plans, so there is no issue of a separate fund which is held in trust. Curtiss-Wright Corp. v. Schoonejongen, 115 S.Ct. at 1228; Hozier v. Midwest Fasteners, Inc., 908 F.2d at 1158-1162, esp. 1159 (3d Cir. 1990) ("Because the severance plan at issue in this case was unfunded, there is no question regarding the management or investment of a separate trust."); Sutton v. Weirton Steel Division of National Steel Corp., 724 F.2d 406, 411 (4th Cir. 1983) ("unfunded nature" of employer's liability distinguished from cases,

Just this month, this Court provided the model for analyzing whether an employer's conduct falls within the scope of a fiduciary's role under ERISA and, thus, is subject to scrutiny as a potential violation of its fiduciary duty provisions. Varity Corp. v. Howe, 1996 U.S. LEXIS 1954 (March 19, 1996), slip op. at 5-6. The Court explained that ERISA's general fiduciary duties and related statutes, including the definition of "fiduciary" in § 3(21), must be interpreted and applied by reference not only to the text and purpose of ERISA but also to the common law of trusts and the duties imposed under the trust document.[23]

Looking first to the relevant language in § 3(21)(A), "a person is a fiduciary with respect to a plan to the extent:

> (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice . . . , or has any authority to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such a plan.

29 U.S.C. § 1002(21)(A). The language indicates, inter alia, that a person may be a fiduciary either because his *conduct* is such that he "exercises" certain authority or control over the plan, or because his *status* is such that he "has" any authority or responsibility in the administration of the plan, whether or not the authority or responsibility is exercised or carried out.

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where courts have found that fiduciaries have violated § 406); Phillips v. Amoco Oil Co., 799 F.2d 1464 (11th Cir. 1986).

23/ In so doing, the Court "recognized that [while ERISA's] fiduciary duties draw much of their content from the common law of trusts, . . . ERISA's standards and procedural protections partly reflect a congressional determination that the common law of trusts did not offer completely satisfactory protections." Id., at 6. Thus, trust law will "offer only a starting point, after which the courts must go on to ask whether, or to what extent, the language of the statute, its structure, and its purposes require departing from common-law trust requirements." Id., at 7.

Spink contends that Lockheed is a fiduciary under subclause (i) because, in amending the plan, it exercised actual authority and control over the management and disposition of plan assets, and under subclause (iii), because, as a named fiduciary under the Plan, it "ha[d] discretionary authority or discretionary responsibility in the administration of such a plan," including the assigned duties of amending the plan, ensuring its qualification under law, and designating members of the Committee to administer the Plan. (JA 46).

1. By Amending the Plan, Lockheed Exercised Actual Control Over the Disposition of Plan Assets.

Nothing in § 3(21)(A) supports Lockheed's argument that amending a plan may never be a fiduciary act. There are no references in the section or in any other part of ERISA to the status, role or functions of a "settlor," nor any statutory language which marks the act of plan amendment as outside the scope of fiduciary duties. On the contrary, one who "exercises" authority or control can do so in any number of ways, and no language in § 3(21)(A) distinguishes fiduciary methods of exercising power over plan assets from non-fiduciary ones. A fiduciary is one who exercises "any" kind of authority or control over plan assets in any way. It is plain that one who amends a plan to direct the administrators to dispose of plan assets in a particular way has exercised control over the "management or disposition of [plan] assets." 29 U.S.C. § 1002(21)(A)(i).

Lockheed suggests this phrase should be read to exclude any powers traditionally reserved to the settlor under common law trust analysis. But even under common law, Lockheed would not have had the power to amend the plan in the way it did. Whether in creating a new trust or in amending the provisions of an existing one, the settlor cannot establish a provision which "run[s] counter to any rule or policy of the law"; any such provision would be invalid and unenforceable. I Fratcher, Scott on Trusts, § 4, p. 53 (4th ed. 1989). The settlor is, therefore, without power to impose a trust provision if its enforcement would be contrary to law, including if it "involves a disposition of the trust property in

a manner which is against public policy." Restatement of Trusts, § 62, pp. 162, 166.

While there may or may not be reasons to exclude certain settlor functions from the broad scope of "fiduciary" duties under ERISA,[24] the common law provides no justification for carving out "settlor" conduct when it results in an amendment directing that trust assets be disposed of in a way which is contrary to the law. An exception which condoned such an amendment as within the settlor's prerogative would render ERISA's protections less substantial than those under common law -- a result which would flatly contradict Congress' intent in passing ERISA. Varity Corp. v. Howe, slip op. at 6; 29 U.S.C. § 1001(a).

Rejection of Lockheed's "amendment" exception to fiduciary status under § 3(21)(A)(i) is also consistent with related provisions of ERISA. Violations of § 406 occur when there is a "direct or indirect" disposition or use of trust assets which is contrary to federal public policy and law because it is a transaction involving the plan and a party in interest or a fiduciary's self-dealing.[25] ERISA § 406, 29 U.S.C. § 1106. It would be strange indeed if the entity who used its authority to initiate and direct such a disposition of assets -- as did Lockheed here -- were considered a non-fiduciary and, thus, immune from fiduciary liability, even though its conduct led to or "cause[d]" an illegal "disposition of assets" when the plan amendment was implemented. This result would completely undermine "the fiduciary requirements of ERISA [which] specifically insulate the trust from the employer's interest." NLRB v. Amax Coal Co., 453 U.S. 322, 333, 101 S.Ct. 2789 (1981).

24/ Since the violation of ERISA's "prohibited transaction" rule is the essence of Spink's claim against Lockheed under § 406(a)(1)(D) and the only fiduciary issue as to which this Court granted certiorari, there is no reason in this case to address the broader issue posed by Lockheed and its amici as to whether an employer has unlimited power to amend a plan to add eligibility criteria which do not violate ERISA.

25/ Cf., Kayes v. Pacific Lumber Co., 51 F.3d 1449 (9th Cir. 1995), cert. den., __ U.S. __, 116 S. Ct. 301, 1467-68 (1995) (fiduciaries' indirect use of surplus plan assets as collateral to obtain loan to finance takeover constituted prohibited transaction even though assets were never at risk).

Such a construction not only robs § 406(a) of its force, it undermines the vitality of a related fiduciary provision. Under § 405(a)(3) and (c)(2)(B), a plan fiduciary is liable for the breach of fiduciary duty by another fiduciary if he has knowledge of the breach but fails to make "reasonable efforts under the circumstances to remedy the breach." 29 U.S.C. § 1105(a)(3) and (c)(2)(B). Like a co-fiduciary who is liable under these provisions, an employer who amends a plan to add an illegal provision necessarily knows of the administrator's eventual breach in implementing the amendment but does nothing to prevent or remedy it. It makes no sense that ERISA would impose "co-fiduciary" liability on Lockheed for its mere knowledge and failure to act, while excusing its actual exercise of power in amending the plan to add an illegal term.[26]

Spink's contention that Lockheed acted as a fiduciary here is also borne out by case law. This Court has recognized that, while basic eligibility rules in a collectively-bargained pension plan are not subject to scrutiny for their reasonableness, plan administrators breach their fiduciary duties when they maintain plan terms which violate federal law. "The substantive terms of [such] employee benefit plans must comply with the detailed and comprehensive standards of the ERISA," including presumably § 406's prohibition against "party in interest" transactions. UMW v. Robinson, 102 S.Ct. at 1234.

Several courts of appeals have evaluated amendments disposing of plan assets under applicable fiduciary standards. In Hickerson v. Velsicol Chemical Corp., 778 F.2d 365 (7th Cir. 1985), the Seventh Circuit rejected the argument that an

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26/ ERISA § 405(c)(1) and (2) demonstrate the untenable nature of Lockheed's argument that plan design can never involve fiduciary acts in another way. These sections concern the plan adoption of written procedures allocating fiduciary responsibilities amongst named fiduciaries or allowing named fiduciaries to designate persons other than themselves to carry out fiduciary responsibilities. ERISA § 405(c)(2) provides that, if a plan "expressly provides" for such a procedure and a fiduciary follows that procedure in allocating or designating fiduciary responsibilities, then such named fiduciary shall not be liable for the acts or omissions of the person carrying out such responsibilities, unless, inter alia, the named fiduciary violated § 404(a)(1) fiduciary duties in the "establishment" of the written procedure. ERISA § 405(c)(2)(A)(ii).

amendment converting the employer's profit-sharing plan to a defined benefit pension plan was beyond fiduciary scrutiny, noting that "[p]lan trustees are fiduciaries under a strict duty to deal with the funds entrusted them solely to the benefit of plan participants," and thus may not use plan amendments "in an attempt to generate a windfall through conversion." Id., at 377.[27] See Amato v. Western Union Int'l, Inc., 773 F.2d 1402, 1417 (2d Cir. 1985), cert. denied, 474 U.S. 1113 (1986) (conspiracy to enact and implement the Plan amendment to create surplus for use of plan fiduciaries stated claim for breach of fiduciary duty); Delgrosso v. Spang and Co., 769 F.2d 928 (3rd Cir. 1985) (plan sponsor violated fiduciary duties under § 404 by amending pension plan to provide for reversion of assets to itself); Eaves v. Penn, 587 F.2d 453, 458 (10th Cir. 1978).

Even the cases relied on by Lockheed establish that a plan sponsor's power to amend the plan may not be exercised to include plan provisions which violate the substantive terms of ERISA.[28] As a result, the courts in those cases go beyond the initial question of whether the amendment process may be scrutinized as a fiduciary act to determine

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27/ Contrary to the suggestion of ERIC, nothing in Hickerson or any cited case involving a spinoff benefits plan permits Lockheed to use plan assets held in trust to buy off litigation liabilities either as a condition to receiving benefits or as a promised reward for a litigation release. Hickerson erects a fiduciary barrier to such raids on plan assets and the other cases simply do not confront a plan sponsor's improper use or looting of assets. E.g. Bigger v. American Commercial Lines, 862 F.2d 1341 (8th Cir. 1988) (although "ERISA imposes fiduciary duties upon pension sponsors," spin-off did not violate ERISA because it complied with § 208 in transferring assets from one plan to another).

28/ See, e.g., Izzarelli v. Rexene Products Co., 24 F.3d 1506, 1524 (5th Cir. 1994) ("[I]n general, an employer that decides to terminate, amend, or renegotiate a plan does not act as a fiduciary, . . . , provided that the benefits reduced or eliminated are not accrued or vested at the time, and that the amendment does not otherwise violate ERISA or the express terms of the plan."); Moore v. Reynolds Metals Co. Retirement P., 740 F.2d 454, 457 (6th Cir. 1984) ("[A]n employer is free to choose which benefits to include in a retirement program so long as the stringent requirements of ERISA are met and no other law or policy is violated.").

whether the plan document, as amended, violates any substantive provision of ERISA.[29]

This is true even in Johnson v. Georgia-Pacific Corporation, 19 F.3d 1184 (7th Cir. 1994) -- a case which Petitioners showcase in their argument. (Pet. Brief 17-18, 22). In Johnson, the plan sponsor's Board of Directors adopted a plan amendment in November, 1989 which provided that, in the event of a change in control of the corporation, benefits to current employees would be increased so as to exhaust the surplus assets and those increased benefits would be deemed vested immediately. Corporate control did change and, in March, 1990, the terms of the plan, as amended, provided increased and fully vested benefits to current employees.

After observing that "when amending the plan in November, 1989 the defendants did not act as fiduciaries under ERISA," the Seventh Circuit considered whether the "implementation of the amendment in March, 1990" violated § 406 of ERISA, finding no violation because no asset was exchanged for another or otherwise disposed of as a result of the amendment. Id., at 1189. Finally, the court of appeals addressed and rejected the retirees' argument that the terms of the plan as amended violated their rights under ERISA by denying them enhanced benefits which were provided to current employees. Unlike in this case, therefore, the corporate officials who amended the plan in Johnson received no benefit for themselves or the plan sponsor in exchange for the enhanced benefits which went to employees in March, 1990, and the amendment itself did not violate any provision of ERISA. Thus, Johnson provides implicit support for Spink's position by recognizing both that an amended plan must comply with ERISA's terms in order to pass muster and that plan amendments which cause a plan to engage in a prohibited transaction violate ERISA.[30]

29/ E.g. Averhart v. U.S. West Management Pension Plan, 46 F.3d 1480, 1488 (10th Cir. 1994).

30/ Other cases cited by Petitioners or their amici are simply not on point either because they deal with the creation and funding of a new plan, rather than the use of existing funds held in trust, e.g., Akers v. Palmer, 71 F.3d 226, 230-231 (6th Cir. 1995), or they concern eligibility criteria for

Petitioners attack the Ninth Circuit's holding as a "powerful deterrent to creating new pension plans and new benefits within existing plans, since it would subject the plan's benefit eligibility criteria to a stringent fiduciary review rather than simply permitting the plan sponsor to determine these conditions." (Pet. Brief 6). But the Ninth Circuit did not invalidate (nor did Spink challenge) any of the benign "eligibility criteria" connected with the Plan's early retirement program. (JA 49-50). Because the provision conditioning the receipt of benefits on executing a waiver of all claims against Lockheed directs the plan to engage in a prohibited transaction, it is utterly disingenuous to characterize it as a benign eligibility criterion. The kinds of eligibility criteria which have been upheld by the courts are provisions, like the requirement of current employment status in Johnson, which themselves do not violate any substantive provision of ERISA.[31]

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welfare plans which do not hold funds in trust, see cases cited in footnote 22, supra, pp. 15-16.

31/ E.g., Siskind v. Sperry Retirement Program, Unisys, 47 F.3d 498 (2d Cir. 1995) (challenging plan amendment which provided enhanced retirement benefits to employees in certain divisions, while denying them to others); Belade v. ITT Corp., 909 F.2d 736 (2d Cir. 1990) (attacking newly created retirement plan offering benefits only to certain full-time employees in designated departments); Averhart v. US West Management Pension Plan, 46 F.3d at 1488 (challenge to providing benefits to employees eligible for Directors' Retirement Program but not to other employees); Izzarelli v. Rexene Products Co., 24 F.3d at 1523 (challenge to amended plan amounted to argument that new terms benefitted some participants at the expense of others); Moore v. Reynolds Metals Co. Retirement P., 740 F.2d 454, 455 (6th Cir. 1984) (challenge to requirement that employees complete 5-month waiting period in order to receive benefits).

2. As a Named Fiduciary Under the Plan, Lockheed Had Discretionary Authority and Responsibility Regarding Plan Administration.

Under § 3(21)(A)(iii), a person is a fiduciary by virtue of the mere fact that he "has discretionary authority or discretionary responsibility in the administration of the plan." 29 U.S.C. § 1002(21)(A)(iii). "The ordinary trust law understanding of fiduciary 'administration' of a trust is that to act as an administrator is to perform the duties imposed, or exercise the powers conferred, by the trust documents." Varity Corp. v. Howe, slip op. at 12.

The Plan document confers on Lockheed several duties or powers in its role as a named fiduciary including, inter alia, amending the Plan, qualification of the Plan under applicable law, and designating the members of the Plan Committee. (JA 46). Lockheed's conduct in (1) amending the Plan document, (2) in a manner which renders it in violation of "applicable law" and (3) directing its own designees on the Plan Committee to implement the illegal amendment implicates the company's discretionary responsibilities with regard to all 3 assigned duties.

What is more, Lockheed assumed additional duties of plan administration through the enactment of the amendment, thereby inserting itself into the traditional role of a plan administrator. The amendment provides that the participant's employer is to prescribe and collect the forms for electing the voluntary retirement program, file the names of participating members with the Plan Committee, and even draft the Settlement Agreement and General Release it desires. (JA 50). Through its amendment, Lockheed not only directed the administration of an illegal provision but intervened to control the process of its implementation. For all these reasons, Lockheed's authority and responsibilities as a named fiduciary under the plan render it a fiduciary under § 3(21)(A).

III. IN ENACTING OBRA, CONGRESS PROHIBITED USE OF AN ACCRUAL FORMULA WHICH EXCLUDES PRE-ENACTMENT YEARS OF SERVICE WHEN AN EMPLOYEE WAS BARRED FROM PARTICIPATION BECAUSE OF AGE.

In 1967, Congress passed the ADEA "to promote employment of older persons based on their ability rather than age" and "to prohibit arbitrary age discrimination in employment." 29 U.S.C. §§ 621, 623(a)(1). ERISA too includes a ban on excluding employees from pension plan participation because of age. ERISA § 202, 29 U.S.C. § 1052. Prior to 1986, ERISA's general prohibition had a very narrow exception[32] which permitted defined benefit plans to exclude from plan participation any person who began working for the employer after reaching an age within five years of the plan's normal retirement age.

Pursuant to this exception, the Plan set a normal retirement age of 65, and excluded Spink and other employees who began working for Lockheed on or after their 60th birthday. (JA 58; CR 7 p. 256). Although not permitted by any statutory language, some employee benefit plans, including Lockheed's, also cut off benefit accrual or otherwise

32/ In the context of remedial social legislation like the ADEA and ERISA, exceptions to coverage are to be narrowly construed so as to ensure that the overall remedial purposes are not undermined. Kross v. Western Elec. Co., Inc., 701 F.2d 1238, 1242 (7th Cir. 1983) (ERISA); EEOC v. State of Maine, 644 F.Supp. 223, 226 (D.Me. 1986) (ADEA).

reduced older workers' benefits based on their age.[33] (CR 7, pp. 270-1).

In 1986 Congress enacted Subtitle C, entitled "Older Americans Pension Benefits," as part of OBRA 1986, to advance the "overall objective" of "assur[ing] that employee benefits plans do not discriminate on the basis of age." Conference Report, H.R.Rep. No. 99-1012, 99th Cong., 2d Sess. 379 (1986), *reprinted in* 1986 U.S.C.C.A.N. 4019, 4024 ("Conf. Rep."). To achieve this purpose, OBRA 1986 amended ERISA, the ADEA, and relevant portions of the Internal Revenue Code ("IRC") to prohibit retirement plans from excluding employees from participation because of age and to bar them from terminating or reducing the rate of benefit accrual because of an employee's age.

Under the Plan, as amended in response to OBRA, Spink became a participant on December 25, 1988, the first day of the plan year beginning in 1988. (JA 42). When he retired 1 1/2 years later on June 30, 1990, the Plan calculated his benefits using a benefit accrual formula which disregarded his pre-OBRA years of service because of his age at time of hire. Spink contends that, in doing so, Petitioners violated OBRA's prohibitions on reducing the rate of an employee's benefit accrual because of age. The question is not whether Congress sought to impose "retroactive participation" under OBRA 1986, but whether it wanted to prevent benefit accrual calculations from being decreased

33/ Contrary to Petitioners' assertion (Pet. Brief 32), the majority of courts examining the issue have held that the pre-OBRA practice of ceasing benefit accrual based on age violated the ADEA. E.g. AARP. V. Farmers Group, Inc., 943 F. 2d 996 (9th Cir. 1991), cert. denied, 502 U.S. 1059 (1992), Puckett v. United Air Lines, Inc., 705 F. Supp. 422 (N.D. Ill. 1989); Johnson v. Mayor and City Council of Baltimore, 637 F. Supp. 903 (D. Md. 1986), aff'd, 829 F. 2d 35 (4th Cir. 1987); EEOC v. Minneapolis Police Relief Ass'n, 645 F. Supp. 367 (D. Minn. 1986). This controversy began when DOL issued an Interpretative Bulletin stating it was permissible to cease benefit accrual for older workers. AARP v. EEOC, 655 F. Supp. 228, 232 and n. 9 (D.D.C.), rev'd in part, 823 F. 2d 600 (D.C. Cir. 1987). When it took over regulatory authority, the EEOC took a contrary view and voted twice to rescind the bulletin for conflicting with the ADEA. The EEOC Chairman also testified before Congress that the bulletin was inconsistent with the ADEA. The bulletin was rescinded in 1987 pursuant to court order, prior to the effective date of OBRA. Id.

because of any age-based considerations. The Ninth Circuit correctly held that it did.

A. The Plain Language of OBRA 1986's Benefit Calculation Provisions Bars Any Kind of Reduction In The Rate Of Benefit Accrual Because of Age.

Petitioners contend that the Ninth Circuit's ruling conflicts with this Court's decision in Landgraf v. USI Film Products, 114 S.Ct. 1483, arguing there is "no clear congressional intent" favoring a retroactive application of §§ 9201 and 9202. (JA 10). Under Landgraf's 3-part analytical model, however, the first question is "whether Congress has expressly prescribed the statute's proper reach." Id. at 1505. If so, the court should apply the statute as Congress intended, whether or not that application would be retroactive. Id. The language of OBRA 1986's benefit accrual provisions and their effective date clause shows Congress' intent to prohibit plans from reducing benefit accrual because of age, whether by excluding years of service because of age or through any other means.

The first section of OBRA 1986[34] announces Congress's purpose in its title, "Prohibition Against Discrimination on the Basis of Age in Employee Pension Benefit Plans." Pub. L. No. 99-509, § 9201, 100 Stat. 1973 (1986). Section 9201 amended the ADEA to make it "unlawful for an employer . . . to establish or maintain an employee pension benefit plan which requires or permits in the case of a defined benefit plan, the cessation of an employee's benefit accrual, or the reduction of the rate of an employee's benefit accrual, because of age". 29 U.S.C. § 623(i)(1)(A). Section 9202 made the same modifications to ERISA and the IRC. 29 U.S.C. § 1054(b)(1)(H)(i).

34/ OBRA's Subtitle C has four sections: § 9201 amends the ADEA to bar discrimination in benefit accrual; § 9202 enacts parallel provisions in ERISA and the IRC; § 9203 amends ERISA and the IRC to repeal provisions permitting exclusion of certain older workers and to authorize the use of a delayed normal retirement age for workers hired within 5 years of normal retirement age under the Plan; and § 9204 sets the effective dates for the other sections. 100 Stat. 1973-1980.

There is no question that these provisions are fully applicable to any employee who, like Spink, worked 1 hour during the 1988 plan year or thereafter. The provisions themselves bar age discrimination in calculating "an employee's benefit accrual." Entitled "Applicability to Employees With Service After 1988," § 9204(a) of OBRA 1986 sets forth the relevant effective date:

> (1) IN GENERAL. -- The amendments made by sections 9201 and 9202 shall apply only with respect to plan years beginning on or after January 1, 1988, and only to employees who have 1 hour of service in any plan year to which such amendments apply.

100 Stat. 1979 (emphasis added). As the statutory language makes plain, the new provisions barring age discrimination in benefit accrual were intended by Congress to apply broadly to all employees with service after 1988.

The Ninth Circuit held that "the most natural reading" of OBRA 1986's prohibitions on reducing "the rate of an employee's benefit accrual" because of age "compels us to conclude that pre-enactment service years must be included in benefit accrual calculation." (JA 81-82). Recognizing that the benefit accrual formula under Lockheed's plan included Credited Service as a key factor and that "Spink's credited service was calculated as lower than that of a younger employee's because he was denied credit for all years of his employment," the Ninth Circuit found that this age-based reduction came within the "essence of OBRA's express prohibitions" and implied that allowing a rate reduction to be accomplished indirectly by discounting the number of credited service years, rather than directly by reducing one of the numerical factors or "rates" in a benefit accrual formula, would eviscerate the force of the OBRA 1986 prohibition. (Id. 83).

The conclusion that any age-based manipulation of the benefit accrual formula will violate OBRA's benefit accrual provisions is borne out by an examination of the subsections which follow the clause barring "the reduction of the rate of an employee's benefit accrual, because of age." 29 U.S.C. § 623(i)(1). For example, subparagraph (2) clarifies

that "a limitation on the amount of benefits a plan provides or a limitation on the number of years of service or years of participation which are taken into account for purposes of determining benefit accrual under the plan" will be permitted so long as they are imposed "without regard to age." Similarly, subparagraph (6) provides that a plan will not violate the statute because "the subsidized portion of any early retirement benefit is disregarded in determining benefit accruals." Both provisions make explicit reference to "determining benefit accrual" under the plan which is done through applying the benefit formula. Even more significantly, both provisions implicitly condemn the age-based reduction here: subparagraph (2) recognizes that limitations on the years of service or participation considered "[with] regard to age" are prohibited; and subparagraph (6) suggests that disregarding certain portions of relevant factors, not just decreasing in a percentage "rate" for years of participation, will violate the statute. Further, as the Ninth Circuit noted, when Congress enumerates exceptions such as those in subparagraphs (2) and (6), it is reasonable to conclude that no other exceptions apply. (JA 84 and citations therein).[35]

Had Congress wanted to limit benefit accrual under § 204(b)(1)(H)(i) only to years after January 1, 1988 or to years in which an employee was a plan participant prior to

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35/ When it passed OBRA 1986, Congress was aware of a number of different ways in which the benefit accrual formula could be manipulated to discriminate against older workers because of their age. DOL's Interpretive Bulletin described a variety of them, including the cessation of employer contributions, failing to credit service after normal retirement age, being exempt from doing actuarial adjustment for older workers, cutting off benefit accrual, delaying benefits to actual retirement date rather than as of normal retirement age, disregarding salary increases obtained after normal retirement age, and preventing older workers from obtaining benefit improvements which would be available to other plan participants. 29 C.F.R. § 860.120(f)(iv)(3), set forth in AARP v. EEOC, 655 F.Supp. at 233 n. 10. Given its knowledge of the bulletin and the controversy surrounding it, it is clear that Congress used broad language barring reduction of the rate of benefit accrual to encompass all these discriminations and any other possible ones and that Congress did not intend to preserve any of these discriminatory methods of benefit calculation, since none of them are identified as permissible in any provision of OBRA.

OBRA 1986, it could easily have done so by borrowing from existing language in § 204 of ERISA. But, unlike the language it used in § 204(h), which dictates notice requirements in connection with certain plan amendments, Congress did not restrict the prohibition on age-based benefit calculations to those resulting in a "reduction in the rate of future benefit accrual."[36] Similarly, Congress could have borrowed language from § 204(b)(1)(D) which states that certain provisions "shall not apply with respect to years of participation before the plan year to which this section applies," or with a slight modification "shall only apply to years of participation" before that plan year. In light of these readily available options, Congress's decision to use different language must be regarded as significant.

The Ninth Circuit's construction of OBRA 1986 is consistent with judicial interpretations of § 204(h), which provides that a defined benefit plan "may not be amended so as to provide for a significant reduction in the rate of future benefit accrual," unless plan participants and beneficiaries receive notice in compliance with the statute. 29 U.S.C. § 1054(h) (emphasis added). Although few decisions have interpreted this provision, the Seventh Circuit construed the "rate of future benefit accrual" language in the same expansive manner that the Ninth Circuit read OBRA 1986's similar language. Davidson v. Canteen Corp., 957 F2d 1404 (7th Cir. 1992).[37]

36/ Nor did Congress rely on the statutory definition of "years of participation" in § 204(b)(4)(A) to define the nature and scope of its prohibition against discriminatory benefit accrual. 29 U.S.C. §1054(b)(4)(A).

37/ The benefit formula in Davidson included a "compensation" factor which the company altered by amending it to exclude income from stock options. Rejecting the company's argument that there was no "reduction in the rate of future benefit accrual" because it "did not adjust the percentage of compensation that would figure in a participant's pension payments," the Court ruled that "ERISA cannot allow a 'clarification' . . . of 'compensation' to achieve the same result as a reduced rate of accrual without the same effects," noting that the distinction is meaningless since both ensure that future benefit accrual will be reduced. Id. at 1407. Accord DiCioccio v. Duquesne Light Company, 911 F.Supp. 880 (W.D. Pa. 1995).

The Ninth Circuit's conclusion that "rate of benefit accrual" means the formula used to calculate an employee's accrued benefit is also consistent with other provisions in ERISA. While the statute does not provide a definition for "rate of benefit accrual," under § 3(23)(A) of ERISA, "[t]he term 'accrued benefit' means . . . in the case of a defined benefit plan, the individual's accrued benefit determined under the plan and . . . expressed in the form of an annual benefit commencing at normal retirement age." 29 U.S.C. § 1002(23)(A).[38] It follows, therefore, that the "rate of benefit accrual" is the formula by which the accrued benefit is determined, and that a manipulation of any factor or definition in the formula can effectuate a reduction in the rate of benefit accrual.

Petitioners read the benefit accrual provisions narrowly to mean that there may be no reductions in the "rate" at which an employee collects *years of participation*. Nothing in the language of OBRA 1986 suggests such a restrictive reading. Instead Petitioners' argument rests on the false premise that "ERISA requires pension benefit accruals to be based upon years of participation."[39] (Pet.

38/ See also ERISA § 204(b)(1)(A)-(D) (minimum standards for benefit accrual are also set forth as detailed formulas which establish the minimum level of "the accrued benefit to which each participant is entitled upon his separation from the service").

39/ Contrary to Lockheed's contention, ERISA permits benefit calculation formulas which do not rely on either years of service or participation. E.g., Labor Reg. § 2540.204-3 (identifying permissible formulas, including under (b)(1), a formula based on a percentage of compensation, without regard to years of service). In enacting OBRA, moreover, Congress explicitly recognized that benefit computations may be based on factors other than years of participation. E.g. Conf. Rep. at 4023 (plan does not violate benefit accrual rule "merely because the plan limits benefits to a stated dollar amount or a stated percentage of compensation"); § 4 of ADEA, 29 U.S.C. § 623(i)(2). Further, Petitioners' reliance on § 204(b)(1)(C) of ERISA for its faulty proposition is misplaced, since this is merely one of the clauses which sets minimum benefit accrual standards which all covered plans must satisfy. 29 U.S.C. § 1054(b)(1)(A)-(C). While a plan's benefit accrual formula must result in retirement benefits which meet these minimum standards, it does not have to use years of participation as a factor in calculating benefits. Labor Reg. § 2540.204-3. Further, even if a plan's benefit accrual provisions conform to these standards, they still must also comply with the discrimination bar in §

Brief 34). The "rate" of benefit accrual is a much broader notion, however. The formula used to determine benefit accrual may involve numerous factors, including the type of employment engaged in, the number of years of service, the amount of an employee's salary or wage, and definitions of the type or level of income to be considered in benefit calculations.[40] Taken together all these factors in the formula constitute the "rate of benefit accrual," and it is this rate which may not be reduced because of age.

Petitioners attack the Ninth Circuit's interpretation as one which "confuses the concepts of (1) the 'rate of an employee's benefit accrual' . . . with (2) the total benefit accrued" and attempt to clear up the perceived confusion by reference to the allegedly incremental nature of benefit accrual and its rate over time. (Pet. Brief 35-37 and n. 20). But it is the Petitioners who are confused. Under a non-contributory defined benefit pension plan, such as the Plan here, a participant does not "accrue" benefits in the sense of collecting or amassing them in an account which is maintained on his or her behalf. Instead, at the time a Plan participant retires, the Plan uses a "formula" to calculate the participant's "accrued benefit" often by reference to various factors such as the employee's years of service or the amount of compensation received. While certain facts such as an employee's years of service or his salary in certain years may become fixed, neither the significance of those antecedent

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1054(b)(1)(H)(i).

40/ While certain restrictions must be observed, "the potential number of benefit formulas is almost limitless." M. Canan, Qualified Retirement and Other Employee Benefit Plans, vol. 1, § 3.52, p. 159 (West Publishing 1995). But two primary types are used: (1) the "fixed benefit" formula, under which benefits constitute a certain percentage of recognized compensation or a flat, fixed sum without any consideration as to the number of years of service; and (2) the "unit benefit" formula, under which benefits constitute a certain percentage of compensation or a flat dollar amount for each year of service with the employer. 1 Mamorsky, Employee Benefits Law, § 3.03[5], p. 3-20.13 (Law Journal Seminars Press 1992).

facts nor the actual benefits which will flow from them can be determined until the date an employee retires.[41]

Petitioners also take issue with the Ninth Circuit's focus on what impact the Plan's age-based criteria would have on Spink's actual pension benefits in order to determine whether there was an improper "reduction in the rate of benefit accrual." (JA 36). But as a purely practical matter this is precisely what a court must do to determine the real effect of a change in the benefit accrual formula.[42] For all these reasons, the Ninth Circuit properly found that the language of OBRA's benefit accrual provisions barred any discriminatory reduction in a benefit accrual formula, including one which decreases an employee's benefits by excluding certain service years from being considered Credited Service under the plan.

41/ The flaw in Petitioners' argument is revealed by using their own hypothetical plan formula. (Pet. Brief 36-37, n. 20). Assume that a plan has a benefit accrual formula which provides a benefit equal to 1.5% of final compensation times the employee's years of service. Because the employee's compensation level during his early years will not be considered in the final formula, any calculation of either the benefits accrued during these years or the "rate" at which such benefits were accrued would be illusory. A key factor in the "rate of benefit accrual" will not be known until the time of retirement. For example, assuming 100% vesting at the end of 1 year, an employee who earns $30,000 in his first year and retires at its conclusion obtains an "accrued benefit" of $450. If the employee retires 4 years later at a salary of $50,000, he has an accrued benefit of $3,750, or $750 for each year of service. If his final compensation after 5 years is only $20,000, his accrued benefit is only $1,500, or $300 for each year of service. Thus, the value of the benefits "earned" in any service year cannot be accurately measured at the end of that year, but rather at the time of retirement through the application of the benefit accrual formula.

42/ Koenig v. Intercontinental Life Corp., 880 F.Supp. 372, 375 (E.D.Pa. 1995) (because examination of the formulas alone did not reveal whether there was a significant reduction in the "rate of future benefit accrual," under § 204(h), court compared the projected benefit calculations for the two formulas to determine that a significate rate reduction had occurred); DiCioccio v. Duquesne Light Company, 911 F.Supp. 880. Another example of why it is often necessary to run actual benefit calculations to determine the impact of a change in formula can be drawn from the Plan itself. Beginning in plan year 1989, the Plan's benefit formula changed in several respects, including by increasing the money figure in the formula from $2.00 to $16.25, disregarding $119.23 per week which was once included in the formula's salary factor, imposing a new 35-year cap on the previous formula structure, and importing a new factor (the Average Weekly Rate) and a new formula for calculating benefits based on any years of service after the first 35 up to a total of 40 years. (CR 7, 1990 Plan, §§ 1.02, 1.10, 1.12, 6.01(A), pp. 14-15, 19-20, 21, 43-44). In light of the complex and varying nature of the formula changes, the best way to determine whether the Plan increased or decreased "the rate of benefit accrual" is to compare the benefits forthcoming under each formula.

Petitioners' contrary argument rests, not on the benefit accrual provisions of OBRA 1986, but on the participation provisions in §§ 9203(a) and 9204(b). Section 9203(a) repeals prior provisions allowing plans to exclude older employees from plan participation based on their age. Subsection (b) of § 9203 ameliorates the impact of this repeal by allowing pension plans to delay or extend the "normal retirement age" for employees who begin work with an employer within 5 years of the established normal retirement age, until "the 5th anniversary of the time the plan participant commences participation in the plan." Section 9204(b), entitled "Applicability of Amendments Relating to Normal Retirement Age," provides that the § 9203(a) bar on discriminatory participation standards and the companion provision allowing a delayed "normal retirement age" apply "only with respect to plan years beginning on or after January 1, 1988, and only with respect to service performed on or after that date."

Although it is clear from OBRA's language that these provisions deal only with plan participation and computing a delayed normal retirement age, Petitioners seek to superimpose them onto the benefit accrual provisions to deny full benefits to Spink and the putative class. But nothing in OBRA 1986 directs or even permits such a result. Section 9203(a) refers only to the repeal of provisions which allowed plans to exclude older workers from *participation*; it says nothing of *benefit accrual*.

Petitioners argue, nonetheless, that the § 9204(b) language applying the participation amendments to "service performed" on or after January 1, 1988, will have no meaning unless construed to limit the application of the benefit accrual provisions. But § 9204(b) employs language focussing on "service performed" after 1987 to define what

time frames should be counted for figuring out the delayed "normal retirement age" for workers who started work with an employer at an advanced age. The provision expressly provides that, in implementing the new participation provisions, a plan may decide to calculate the delayed normal retirement age under Section 9203(b) solely by reference to "service performed" on or after January 1, 1988. Petitioners' strained attempt to apply § 9204(b) to read it differently is simply not warranted by any statutory language and "would require [this Court] to assume that Congress chose a surprisingly indirect route to convey an important and easily expressed message concerning the Act's" application. Landgraf, 114 S.Ct. at 1495.

Far from assisting Petitioners, a structural analysis of OBRA 1986 strengthens Spink's position.[43] OBRA 1986 simultaneously effects two changes in pension law in order to eradicate age discrimination. If Congress had wanted to restrict the application of OBRA's benefit accrual provisions to years of service after 1987, there would have been no reason to have two effective date provisions. A single provision would have sufficed for all OBRA amendments. Instead, Congress enacted two separate clauses with different language and consciously opted not to limit the applicability of the benefit accrual provisions either to years of service or

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43/ Petitioners contend that the Ninth Circuit's comparison of subsections (a) and (b) of § 9204 conflicts with this Court's supposed holding in Landgraf that "'negative inferences' made from the inclusion of prospectivity language in one part of a statute but not another cannot constitute clear legislative intent of retroactivity." (Pet. Brief 39). Landgraf simply does not stand for such a proposition. The court in Landgraf ruled that, in light of explicit retroactivity language in a prior version of the Civil Rights Act which was mentioned as a reason for the prior bill's veto, specific prospectivity language in two relatively minor provisions in a bill with more than 50 sections did not necessarily imbue a nondescript provision requiring that the Act be "effective upon enactment" with retroactive meaning. Id., 114 S.Ct. at 1493-94. By contrast, the Ninth Circuit compared the only two effective date clauses, sitting side-by-side in a 4-section bill, and reached a conclusion compatible with the substantive provision at issue and Congress' rejection of a previous version which would have limited the "retroactive" application of that provision.

participation on or after January 1, 1988 or any other date.[44] There is no "logical reason why Congress would not include a limitation in the immediately preceding subsection [§ 9204(a)], which would *directly* limit the application of benefit accrual standards, but instead include a temporal limitation in § 9204(b), thereby *indirectly* limiting" those standards. (JA 86).

What is more, Petitioners' argument about § 9204(b) flies in the face of expressed public policy. Assuming, arguendo, that § 9204(b) applies at all to the benefit accrual provisions, any ambiguity about its application must be construed in favor of providing full benefits to all employees regardless of age so as to effectuate the remedial purposes of ERISA, the ADEA and OBRA 1986.[45] This is particularly true here where Petitioners seek to use a strained and ambiguous relationship between two separate statutory provisions to sanction age discrimination in benefit accrual as part of an enactment passed with the "overall objective . . . to assure that employee benefit plans do not discriminate on the basis of age." Conf. Rep. at 4024.[46]

44/ Petitioners argue that the language differences in the two subsections derive from a congressional desire to "leave open the ultimate resolution of the issue of accrual cessation (for pre-OBRA 1986 participants) in the then-ongoing litigation." (Pet. Brief 40). Since the ongoing litigation addressed the manner in which benefits were to be calculated for participants who retired *before* OBRA's effective date, Congress left open the question merely by making OBRA applicable only in plan years after 1987 and only as to persons retiring in those plan years, so the debate about pre-OBRA benefit accrual does nothing to explain the difference between § 9204(a) and (b).

45/ See S.Rep. No. 93-127 (1973), *reprinted in*, 1974 U.S.C.C.A.N. 4639, 4854 ("It is intended that coverage under [ERISA] be construed liberally to provide the maximum degree of protection to working men and women covered by private retirement programs."); Smith v. CMTA-IAM Pension Trust, 746 F.2d 587, 589 (9th Cir. 1984) (ERISA); Rettig v. Pension Ben Guar. Corp., 744 F.2d 133, 155 n. 54 (D.C. Cir. 1984) (ERISA); Dartt v. Shell Oil Co., 539 F.2d 1256, 1260 (10th Cir. 1976), aff'd, 434 U.S. 99 (1977) (ADEA).

46/ Assuming, arguendo, that Petitioners' argument were accepted by the Court, Lockheed's plan still violates the ADEA and ERISA. OBRA 1986 unequivocally states that its bar on excluding older workers from plan participation "shall apply only with respect to plan years beginning on or

B. Legislative History Demonstrates That Excluding Pre-enactment Service Years Based on Age Constitutes A Discriminatory Benefit Calculation.

As in Landgraf, 114 S.Ct. at 1493-94, the Ninth Circuit also probed the legislative history and determined that it "verifie[d] [the court's] reading of the language of the OBRA 1986 amendments." (JA 84). The Ninth Circuit looked at the relevant effective date clause, § 9204(a)(1), and its relation to an earlier version of this clause which would have expressly limited OBRA 1986's prohibition on age-based benefit calculations to certain "accrual computation periods."[47] (JA 85). The Ninth Circuit found that, because it jettisoned the limiting language in favor of a clause making the prohibition broadly applicable to all employees in plan years after 1987, Congress plainly intended no limit on the years of service to be included in benefit calculations under OBRA's provisions. (JA 86).

A second aspect of the legislative history supports Spink's interpretation. The final version of OBRA 1986 departed from the original Senate amendment by excising its provision sanctioning continued age discrimination based on the employee's age at the date of hire. According to the Conference Report, the Senate amendment on non-discriminatory benefit accrual provided:

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after January 1, 1988, and only with respect to service performed on or after such date." See Conf. Rep, at 4019, 4027. Spink worked a full year of Credited Service from January 1 through December 24, 1988, but was only credited with years of participation worked after December 25, 1988. Thus, even if Lockheed's limiting reading of OBRA 1986 were correct, the plan still failed to comply with the law, because it shorted Spink and similarly-situated participants of one year of participation under the Plan's benefit formula.

47/ The Senate amendment demonstrates the alternative which was ultimately rejected by Congress: "Under the Senate amendment, the provision is effective with respect to employees who are employed after December 31, 1988, with respect to accrual computation periods beginning after December 31, 1986. In the case of employees not employed after December 31, 1988, the provision applies to accrual computation periods beginning after December 31, 1988." Conf. Rep. at 4022.

> A defined benefit pension plan is not treated as failing to satisfy the benefit accrual requirements merely because the plan (1) excludes an employee from plan participation if the employee is hired within five years before normal retirement age under the plan, or (2) imposes a limit on the benefits that the plan provides or on the number of years of service or plan participation taken into account in calculating an employee's benefit under the plan.

Conf. Rep. at 4022. Rather that including an exception for those who were previously excluded because of age, the final version of the bill makes no mention of the first exception, retaining only the second exception. 29 U.S.C. § 1054(b)(1)(H)(ii). By cutting out this reference entirely, Congress made plain its intent to eliminate all vestiges of the prior age discrimination allowed under federal pension law and to permit no exceptions based on prior age-based exclusions from participation.[48]

C. Relevant IRS Pronouncements Are Consistent With The Ninth Circuit's Interpretation Of OBRA 1986, But Not Entitled To The Deference Accorded Final Substantive Regulations.

Spink contends that the ultimate position of the IRS supports his position, not that of Petitioners. Then EEOC Chairman Clarence Thomas issued proposed regulations on November 27, 1987, which provided, in general, that years of service before 1988 may be disregarded because of age in determining a participant's benefits. 52 Fed. Reg. 45,360 (1987). On April 11, 1988, the IRS published proposed regulations setting forth the general rule that pre-enactment years of service must be included in benefit calculations but carving out an exception for persons, like Spink, who were previously excluded from participation because of age. Prop.

48/ Nor can it be argued that Congress would not have adopted Spink's argument because of the supposedly crippling impact this would have on pension plans. (See AARP Brief 29-30).

Treas. Regs. § 1.411(b)-2, 53 Fed. Reg. 11,877 (1988). On December 9, 1988, the IRS announced its intent to issue final regulations which "will provide that the OBRA benefit accrual rules apply to all years of service (including years of service before January 1, 1988)." IRS Notice 88-126, 1988-2 C.B. 538 (1988). An EEOC notice concurred in the IRS position that "the final regulations . . . will provide that the OBRA benefit accrual rules apply to all years of service (including years of service before January 1, 1988)." 54 Fed.Reg. 604 (1989). Neither notice indicates any intent to carve out an exception to this rule for participants who were once lawfully excluded from participation because of their age.[49]

The Court should avoid any reliance on the exception carved out in the IRS proposed regulations. First, while deference may be due the IRS on matters on which it has substantive expertise and authority, interpreting when and how a new statute goes into effect is uniquely within the province of the courts, not the IRS. Second, no federal agency has issued final regulations implementing OBRA 1986. Courts routinely disregard proposed regulations as unpersuasive, because the agency has not completed formal rule-making and may revise the rules it has proposed.[50] Finally, an administrative interpretation excluding previous years of service, merely because of the age of the employee at the time of hire, conflicts with the plain language and clear Congressional intent of OBRA 1986 and, thus, should not be granted any deference. Chevron USA v. Natural Resources

49/ The IRS notice explicitly provides that, while "[t]axpayers may rely on this notice . . . [n]o inference should be drawn, . . . , regarding any issue not specifically addressed in this notice." Id. The directive to include all years of service in any benefit calculation is "specifically addressed" in the notice, but Petitioners' proposed exception is not.

50/ E.g. Matter of Appletree Markets, Inc., 19 F.3d 969, 973 (5th Cir. 1994) (no deference to proposed regulations); Bolton v. Commissioner of Internal Revenue, 694 F.2d 556, 560-1 n. 10 (9th Cir. 1982) ("the Commissioner nevertheless concedes that a proposed regulation still is not entitled to the deference due a final regulation."); Oakley v. City of Longmont, 890 F.2d 1128, 1133 (10th Cir. 1989) (Prop. Treasury Regs.); Telvest, Inc. v. Bradshaw, 618 F.2d 1029, 1036 n.10 (4th Cir. 1980).

Defense Counsel, 467 U.S. 837, 104 S.Ct. 2778, 2782 n. 9 (1984). Sections III-A, et seq.

D. Because Spink's Construction of OBRA Has No Retroactive Effect, the Presumption Against Retroactivity Does Not Apply.

Even if the Court were to conclude that Congress did not "expressly prescribe[ ] the statute's proper reach," no presumption against retroactivity may be invoked unless the statutory construction urged by Spink would have a retroactive effect. Landgraf v. USI Film Products, 114 S.Ct. at 1505. While Lockheed blithely asserts Spink's position requires a retroactive application, "deciding when a statute operates 'retroactively' is not always a simple or mechanical task." Id., at 1498.

On the one hand, a statute which "takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective." Id. at 1499, quoting Justice Story's opinion in Society for Propagation of the Gospel v. Wheeler, 22 F.Cas. 756, 767 (No. 12,156) (CCDNH 1814). On the other hand, however, a statute "is not made retroactive merely because it draws upon antecedent facts for its operation," Cox v. Hart, 260 U.S. 427, 435, 43 S.Ct. 154, 157 (1922), or because it "upsets expectations based in prior law." Landgraf, 144 S.Ct. at 1499. "[N]o person has a vested right in any general rule of law or policy of legislation entitling him to insist that it shall remain unchanged for his benefit," and a change in law affecting the consequences flowing from past conduct is not considered retroactive. Chicago & Alton Railroad Company v. Tranbarger, 238 U.S. 67, 73, 76 (1915).

The question here is whether a statute enacted in 1986 requiring that all past years of service be included in benefit calculations for older employees who retire in or after 1988 impairs "vested rights" or imposes new obligations based on events "already past," making it retroactive, or whether it merely "upsets expectations based in prior law" by relying on antecedent facts for its prospective application. Because it

impairs no vested rights and imposes no new duties based on completed past events, OBRA 1986 is plainly not retroactive.

Spink's construction neither penalizes past conduct nor impairs vested rights, recognizing as it does that the new benefit accrual provisions of OBRA first became effective in plan years beginning on or after January 1, 1988. Although enacted on October 21, 1986, OBRA's amended provisions did not become operative in *any* plan until more than 13 months later and then only in pension plans with plan years starting on or about January 1, 1988. For many plans, including Lockheed's, OBRA's provisions were not effective for more than 2 years after enactment. Spink has never argued that the benefit accrual provisions or any other aspect of OBRA were operative either prospectively during the 1986 and 1987 plan years immediately following enactment or retroactively during any plan year before OBRA's enactment in 1986. His construction results in no penalties for plans which did not comply in pre-1988 years and no recalculation of benefits paid in those years.

Lockheed can identify no "vested right" it had on October 20, 1986, which it lost as a result of the enactment of OBRA the next day. It is true that, under the law as it existed at the time and in the absence of an intervening change in the law, Lockheed could expect that it would owe no pension benefits to older workers like Spink because of their years of service prior to the 1986 enactment. While it may be that Lockheed converted its understanding of then current law into expectations about the future administration of its pension plan, Lockheed had no *vested right* to expect that future federal regulation would leave undisturbed the nature or extent of its obligations to its older workers in subsequent plan years.[51]

In essence, Lockheed argues that since Congress allowed the Plan to characterize Spink's pre-1988 employment as falling outside the rubric of Credited Service for calculating benefits before OBRA's enactment, any attempt by Congress to alter that characterization in the

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51/ It had no vested right in the "general rule of law or policy of legislation" that certain years of service could be disregarded in calculating future benefits because of the employee's age at time of hire. Chicago & Alton Railroad, at 76.

future would take away its vested rights. But in enacting a new statute, Congress may "choose to classify or reclassify a thing, and provided the new definition is applied only to determine status for the purpose of matters arising in the future, the prohibition on retroactive laws is not violated." U.S. E.P.A. v. New Orleans Public Service, Inc., 826 F.2d 361, 363 (5th Cir. 1987)("A law is not made retroactive because it alters the existing classification of a thing"); Campos v. INS, 16 F.3d 118 (6th Cir. 1994)(same). Further, requiring a new formula to compute the level of future benefits, payments or reimbursements is not retroactive, even if the formula makes reference to pre-enactment facts and characterizes those facts in a manner which sharply diverges from prior law.[52]

The same is true here. Spink's interpretation of OBRA requires that any determination of accrued benefits made in or after plan year 1988 be done according to the new statute's mandates so as to ensure that age-based considerations will not reduce a retiring employee's pension benefits. Interpreting OBRA to prohibit a plan from excluding pre-enactment years of service because of the employee's age at the time of hire simply does not result in a retroactive application of the statute.[53]

Just as it cannot assert impairment of vested rights, Lockheed cannot contend that OBRA, as construed by Spink, "attaches new legal consequences to events *completed* before

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52/ Admin. of Tulane Educational Fund v. Shalala, 987 F.2d 790 (D.C. Cir. 1993)(upholding as purely prospective federal regulations using new formula to compute Medicare reimbursements after 1984, even though regulations permitted government to use new figures for base year 1984 factor in formula and thus ignore the actual reimbursement amount for 1984 which the hospital had established as reasonable through administrative and/or judicial appeals); Asso. of Accredited Cosmetology v. Alexander, 979 F.2d 859, 863 (D.C.Cir. 1992)(no retroactivity where government deemed school ineligible for participation in federal student loan programs based on its students' default rates in previous years, even though those same rates had been permissible under prior law).

53/ Puckett v. United Air Lines, Inc., 705 F.Supp. at ("An employee's benefit amount is calculated with the formula existing at the time of the employee's retirement, not with a formula that existed at the beginning of or during the accrual period," so pre-enactment service years should be included when applying OBRA 1986 after 1987).

its enactment." Landgraf, 114 S.Ct. at 1499 (emphasis added). Supreme Court precedent establishes that a new statute is not retroactive unless all conduct which triggers its operation occurs before the date of enactment; so long as the relevant course of events is completed after enactment, the statute will be deemed to apply prospectively. Reynolds v. United States, 292 U.S. 443, 54 S.Ct. 800 (1934) (although veteran not entitled to subsidized medical care for years prior to enactment of 1924 statute barring pension deductions for such care, prospective application of the statute prohibited any post-enactment deductions, whether the charges arose prior to or after the date of enactment).[54]

One way to pose the retroactivity question, therefore, is to ask whether a statute alters the legal consequences of a closed transaction, a completed course of conduct, or a terminated relationship.[55] The event or act which closes or

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54/ See also United States v. Security Indus. Bank, 459 U.S. 70, 78-79, 103 S.Ct. 407, 412-413 (1982) (holding that using the Bankruptcy Reform Act to invalidate liens perfected prior to its passage would be a retroactive application of the Act); Greene v. United States, 376 U.S. 149, 84 S.Ct. 615 (1964) (holding that employee's entitlement to lost wages under 1955 directive "matured" when he obtained favorable "final determination" reversing his security clearance termination in 1959, so the application of a 1960 regulation issued while his claim was pending would be retroactive); McAndrews v. Fleet Bank of Massachusetts, N.A., 989 F.2d 13, 16 (1st Cir. 1993) (1989 federal statute permitting the Federal Deposit Insurance Corporation, as receiver, to enforce contracts entered into by failed banks, even where the contract contemplated its termination upon insolvency, not considered improperly retroactive because key events triggering the statute's application -- including the bank's insolvency and invocation of the termination clause -- occurred after the date of enactment).

55/ See Claridge Apartments Co. v. Commissioner of Internal Revenue, 323 U.S. 141, 164, 65 S.Ct. 172 (1944) ("It is the normal and usual function of legislation to discriminate between closed transactions and future ones or others pending but not completed."); Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 96 S.Ct. 2882 (1976) ("To be sure, insofar as the Act requires compensation for disabilities bred during employment terminated before the date of enactment, the Act has some retrospective effect . . ."); New York Cent. & Hudson River R.R. Co. v. U.S. (No. 2), 212 U.S. 500, 505-06, 29 S.Ct. 309, 311 (1908) (holding that a statute prohibiting rebates could validly be applied to a rebate paid after the act's effective date with respect to property transported before the act's effective date.).

completes the relevant transaction or relationship has been described by Justices Scalia and Thomas as the "determinative event by which retroactivity or prospectivity is to be calculated." Republic National Bank of Miami v. U.S., 113 S.Ct. 554, 565 (1992) (Thomas, J., concurring); Kaiser Aluminum & Chemical Corp. v. Bonjorno, 494 U.S. 827, 857 n. 3, 110 S.Ct. 1570, 1588 n. 3 (1990) (Scalia, J., concurring). Under the First Circuit's formulation, the "determinative event" is the incident which finally "triggers the statute's application." McAndrews, at 16.

Under Spink's interpretation, OBRA has no impact on his right to non-discriminatory benefit calculation until the beginning of the 1988 plan year. Had Lockheed decided to terminate its Plan during plan year 1986 or 1987, the Plan would have had no obligation to pay Spink or any similarly-situated employee any pension benefits. Nor does Spink contend that OBRA requires the payment of new or different benefits to any employee who retired before plan year 1988. Older workers who retired from Lockheed before December 25, 1988 are simply not entitled to OBRA's protections. Thus, OBRA's application is triggered only where a pension plan operates after plan year 1987, and only with respect to persons who retire after that year. Since both Lockheed's decision to maintain a pension plan in plan year 1988 onward and the post-December 24, 1988 employment of Spink and the putative class occurred well after OBRA's 1986 enactment date, its application here is plainly not retroactive.

What is more, a statute which applies to any employee with "1 hour of service in any plan year to which such amendments apply" is clearly intended to include all employees who retire during those plan years. OBRA, § 9204(a)(1) (emphasis added). The statute explicitly targets an employee's retirement date as the "determinative event" for purposes of its application. It is the participant's employment relationship with the company which must be "completed" or "already past" for a truly retroactive application to occur.

Because the interpretation of OBRA urged by Spink only applies to persons employed by Lockheed more than 2 years after the statute's enactment, it cannot be considered retroactive. As with any law which operates prospectively, Petitioners had the "opportunity to know what the law

[would be] and to conform their conduct accordingly," Landgraf, 114 S.Ct. at 1497, and Petitioners took advantage of this opportunity by amending the Plan to impose the delayed normal retirement age permitted by OBRA. (CR 7 at p. 23). Since Spink's construction operates prospectively, the presumption against retroactivity does not apply. Instead any statutory ambiguity must be resolved so as to advance the remedial purposes of ERISA, the ADEA and OBRA.

E. Even If the Court Were to Deem Spink's OBRA Construction To Be Retroactive, Congress' Intent To Apply It In That Manner Arises From OBRA's Clear Language Read In the Context of ERISA's History.

The presumption against retroactivity is rebutted by "clear congressional intent favoring" the retroactive application which is being urged. Landgraf, 114 S.Ct. at 1505. There is substantial evidence supporting Spink's interpretation of OBRA 1986 in its statutory language, structure, purpose and legislative history and the context in which the new OBRA 1986 provisions are placed in ERISA and the ADEA. Sections III-A & B, supra.

Read in the historical context of ERISA enactments from 1974 to the present, this evidence shows that Congress intended that pension plans be barred from excluding any prior years of service because of age. As AARP has shown in its *amicus* brief in Section III-B, when Congress uses language identifying the first plan year in the future to which a pension amendment will apply or identifying the employees whom the amendment will benefit, as it did in OBRA 1986, the statute is usually intended to be applied so as to include all years of an employee's service. On the other hand, if it intends a more limited application, Congress generally makes that limitation explicit in the statute.

Recognizing the substantial impact that pension regulation can have on an ongoing pension plan, Congress delayed the effective date of many ERISA provisions to allow plans time to conform without endangering their financial stability. Congress also avoided retroactive applications of new provisions so plans would not have to resettle claims of participants who separated from service with the employer

before the effective date of a pertinent ERISA provision.[56] As of the effective date, however, the new ERISA protection comes into full force and effect. Thus, for example, while Congress provided that the full applicability of ERISA's vesting provisions and the plan termination program under ERISA's Title IV should be delayed until several years after enactment, these provisions were fully operative on their effective date with respect to all years of an employee's prior service.[57]

Viewed in light of this history, Congress' intent in passing OBRA 1986's benefit accrual provisions is apparent. While delaying the applicability of the provision until 2 years after enactment to allow plans to adjust to the new requirements and to prevent their application to persons retiring before the effective date, Congress deliberately chose language it has generally used to require that an ERISA provision be fully applicable to all years of service on the enactment date and declined to use any language limiting the relevant service years. Even under the stricter third prong of the Landgraf model, therefore, Spink's interpretation must be accepted.

CONCLUSION

For all the reasons above, Spink requests that this Court affirm the Ninth Circuit's decision with regard to all matters raised by the Questions Presented, remand for further proceedings consistent with the Court's ruling, and grant him attorneys' fees and costs.

56/ Smith v. CMTA-IAM Pension Trust, 654 F.2d 650, 657 n. 7 (9th Cir. 1981); Fremont v. McGraw-Edison Company, 606 F.2d 752, 758 (7th Cir. 1979), cert. denied 445 U.S. 951 (1979).

57/ Nachman Corp. v. Pension Benefits Guaranty Corp., 446 U.S. 359, 382-4 (1980) ("Had petitioner waited another day to terminate, Title I's vesting standards would have become effective, thereby increasing the number of employees whose benefits would have become vested.")

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Respectfully submitted,

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